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# Indian Apex Judicial System before Independence

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## ABSTRACT

*The roots of the present lie deep in the past. This is also true in the case of present Indian Judicial set-up as it is under the Indian Constitution. So, I think it desirable to analyse and give a brief account of Judicial administration at higher level during British period in India-keeping in mind the paramount importance of an independent Judiciary. Specially during the East India Company's rule in India, the judiciary was subservient to the executive. The company gave lesser importance to the judicial independence, fair justice and rule of law. It was interested in the expansion of its trade and territorial possession and it was in favour of protecting its interest even at the cost of justice. If at any time a separate judicial body was established that was put under the thumb of the executive. The voice of the judicial independence was suppressed without least hesitation. But after independence it was thought of to establish a modern independent judiciary, of course not on the basis of Montesquieu philosophy separation of power but devising the power between different organs of Government and balancing the power. Thus, present judiciary enjoys not only the power to interpret the Constitution of India but also to provide complete justice by establishing the rule of law.*

**Keywords:** Independence, Constitution, Rule of Law, Separation of Power.

## I. ESTABLISHMENT OF SUPREME COURT OF INDIA BEFORE INDEPENDENCE:

The British Crown issued a Charter in 1774, which was actually passed as per the provisions of Regulating Act, 1773, establishing the Supreme Court of Judicature at Calcutta which superseded the provisions of the Charter of 1753 and resulted in abolition of mayor's court of Calcutta. The Charter of 1774 contained detailed provision regarding the appointment and removal of the Judges as well as the jurisdiction, powers and functions of the Supreme Court in accordance with the Regulating Act, 1773.

**Composition:** The Supreme Court was to consist of a Chief Justice and three puisne Judges to be appointed by the Crown. Only those persons could be appointed as Judges of the Supreme

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Court who were barrister of not less than five years standing. They were to hold office during the pleasure of the Crown.

**Functions:** It was a Court of Record. It was conferred extensive jurisdiction over civil, criminal, admiralty and ecclesiastical cases. It was also a Court of equity and, therefore, it was given power to administer justice according to the principles of equity and good conscience. It could regulate own procedure and make rules for this purpose.

The rules so made by the Supreme Court were required to be approved by the King-in-Council. The Supreme Court was to nominate three persons annually to the Governor-General and Council who would select one of them as Sheriff. The functions of the Sheriff were to execute the orders of Supreme Court and detain in prison the persons committed by the Court. The Supreme Court was authorised to enroll attorneys and advocates. It could appoint subordinate officers, but their salaries required the approval of the Governor-General and Council.

The Supreme Court was also authorised to regulate court-fee with the approval of the Supreme Council. It was to exercise supervision and control on subordinate courts. It, could also issue writs of certiorari, mandamus error or procedendo to these Courts.<sup>1</sup>

**Jurisdiction:** The jurisdiction of the Supreme Court established under the Charter of 1774 can be explained under the following heads:

**(a) Civil jurisdiction:** -The Court was conferred original jurisdiction in civil cases which extended to the East India Company and His Majesty's subjects and British subjects residing in Bengal, Bihar and Orissa; or any other person directly or indirectly under the employment or service of the Company; or inhabitants of Bengal, Bihar and Orissa if they consented in writing to refer their disputes to the Supreme Court provided the subject-matter of the suit exceeded Rs. 500/-.

**(b) Jurisdiction in criminal cases:** - In matter of criminal cases, the Supreme Court was constituted as a Court of Oyer and Terminer and goal Delivery far the town of Calcutta, the factory of Fort William and factories subordinate thereto. It employed the services of Grand Jury and Petty Jury for trial of criminal cases of British subjects.

The Supreme Court did not have jurisdiction over the native inhabitants of Calcutta and territory of Bengal, Bihar and Orissa. Its jurisdiction extended to His Majesty's subjects and persons in the service of the Company.

Significantly, the Supreme Court did not have jurisdiction over Governor General and members of the Council for any offence excepting treason or felony. The Governor-General, the

Councillors and the Judges of the Supreme Court acted as Justices of Peace and held Quarter Sessions.

The Supreme Court was also empowered to reprieve or suspend the execution of any capital sentence if in its opinion it was a fit case for mercy. In that case, it could refer the case to the British Crown with reasons for recommending mercy. The final decision in this regard was, however, left to the pleasure of the Crown.

**(c) Admiralty jurisdiction:** The Charter of 1774 declared that the Supreme Court was to be the Court of Admiralty for the territories of Bengal, Bihar and Orissa. In this capacity it could try all cases civil and maritime, and all crimes committed upon vessels, ships, ferries and high seas and off-shores of Bengal, Bihar and Orissa with the help of petty jury consisting of British subjects residing in Calcutta.

**(d) Ecclesiastical jurisdiction:** The Supreme Court also exercised ecclesiastical jurisdiction over British subjects residing in Bengal, Bihar and Orissa in the same manner as it was exercised in the Diocese of London. Thus, it could grant probates of wills to the British subjects within the territories of Bengal, Bihar and Orissa and also letters of administration for the goods, chattels and other effects of the British subjects dying intestate. It was also empowered to appoint guardians and keepers for infants and insane persons their estates in accordance with rule prevalent in England.<sup>2</sup>

**(e) Equity Jurisdiction:** -The Supreme Court was to be a Court of Equity and in this capacity, it was empowered to administer justice in a summary manner according to the rules and proceeding of the Chancery Court of England. The Court of Chancery of England was not bound by the technicalities of law and could administer justice according to the principles of justice, equity and good conscience.<sup>3</sup>

**(f) Writ Jurisdiction:** -Supreme Court, being a superior court, could issue writs to Court and officers subordinate to it, which included the Court of Collector, Courts of Requests, Quarter Session, Sheriffs etc. It could issue writs of certiorari, mandamus, error or procedendo to these courts.

**(g) Provision for Appeals:** -In civil cases, appeals from the decision of the Supreme Court could be taken to the King-in-Council in England with the leave of the Supreme Court provided the subject matter in dispute exceeded 1000 pagodas. Such an appeal could be filed within six months of the date of judgment.

In criminal cases, the Supreme Court enjoyed absolute discretion to allow or not to allow appeal to the King-in-Council. Besides, the King-in-Council reserved the right to refuse or admit an

appeal as a special case upon the terms and conditions which it may deem fit.

## **II. MERITS AND DEMERITS OF SUPREME COURT CONSTITUTED UNDER REGULATING ACT 1773 THROUGH CHARTER OF 1774.**

The Regulating Act, 1773 introduced significant changes in the constitution and functioning of the Company's executive government in India and restructuring the judicial administration in the territories of Bengal, Bihar and Orissa by establishing a Supreme Court of Judicature at Calcutta. The chief merits of the Regulating Act, 1773 as also the Charter of 1774 passed thereunder, were as follows:

### **(i) Merits:**

**(a)** The Supreme Court at Calcutta which included the Governor-General and four members of the Council was made the central executive authority with the power of civil and military government within the British possessions in India including the Presidencies of Madras and Bombay. With a view to establishing a strong central government, the Presidencies of Madras and Bombay were subordinated to the Governor-General and Council at Calcutta in matters of making war and peace.

**(b)** The Act conferred legislative powers to the Supreme Council at Calcutta. In order to put a check on arbitrary legislation by the Governor-General and Council, the rules, regulations and ordinances framed by it had to be registered in the Supreme Court and needed latter's approval. The Supreme Court which registered these laws, consisted of Judges who were barristers of law hence the quality of legislation approved by them was bound to be better and effective.

**(c)** The Regulating Act authorised the British Crown to establish a Supreme Court at Calcutta by issuing a Charter. The King issued a Charter of 1774 establishing a Supreme Court of Judicature at Fort William. The Judges of the Supreme Court were professional lawyers, well-versed in law and not lay persons like the Judges of the earlier Mayor's Court. They were appointed by the British Crown and not by the Company's executive authority and were to hold office during the pleasure of the Crown. This ensured independence of Supreme Court free from the control of the Supreme Council.

**(d)** The Supreme Court was conferred far wider jurisdiction than the earlier Mayor's Court. It exercised civil, criminal, admiralty, ecclesiastical and equity jurisdictions. It was also empowered to issue writs to the subordinate courts and its subordinate officers. In order to enable the Governor-General and Council to perform its functions independently, the Governor-General and the members of the Council were not subject to the jurisdiction of the Supreme

Court except in case of treason and felony. They could also not be arrested or imprisoned in any action of suit except in case of treason and felony. However, their goods and effects could be seized to compel obedience of law.<sup>4</sup>

(e) The Regulating Act, 1773 imposed prohibitions on its officials and servants on accepting presents, donations, gifts or rewards etc. from the Princes or native powers with a view to removing corruption and give a clean administration to the inhabitants of Bengal, Bihar and Orissa. The Governor General, members of the Council, Judges of the Supreme Court and other officials of the Company engaged in collection of revenue were also prohibited from engaging in private trade.

(f) There was constant conflict between the Governor-General and his Council. The hostility of three members, namely, Clavering, Monson and Francis against Hastings touched climax in the case of Raja Nand Kumar,<sup>5</sup> wherein they left no stone unturned to see that Hastings was ousted from Governor-General ship and one of them was appointed as Governor-General in his place.

Again, the conflict between the Governor-General and three members of his Council took a serious turn when Clavering, with the support of his colleagues Monson and Francis declared himself as Governor-General on the ground that Warren Hastings had sent his resignation which had been accepted. Hastings denied having sent any resignation. The issue was finally referred to the Supreme Court which decided in favour of Hastings perhaps because Sir Elijah Impey, the Chief Justice of the Supreme Court happened to be a close friend of Warren Hastings.<sup>6</sup>

## **(ii) Demerits.**

The working of the Supreme Court established under the charter of 1774 consequent to passing of the Regulating Act in 1773, suffered from many serious defects. Some of them were as follows:

(a) So far administration of civil justice was concerned, the Supreme Court had jurisdiction over a number of specified persons.

However, it was not clearly defined as to who were to be considered as 'British subject. The distinction between British subjects and the subjects of His Majesty was also not made clear in the Regulating Act.

(b) As stated earlier, the territories of Bengal, Bihar and Orissa were still under the Moghul sovereignty.

Therefore, the Supreme Court being an English Court, ought not to have exercised jurisdiction

over these territories. But the Regulating Act, 1773 empowered the Supreme Court to exercise jurisdiction over certain categories of persons in this region. This was contrary to the settled principles of English law.

(c) The Regulating Act did not specify whether the Company in its Diwani capacity, was subject to the jurisdiction of the Supreme Court or not. Both, the Company and the Supreme Court, frequently clashed on this issue. Being the Diwan of Bengal, Bihar and Orissa, the Company considered itself immune from the Supreme Court's jurisdiction, whereas the Supreme Court held a contrary view. Moreover, the English law was uncertain as to extent to which the Supreme Court could interfere with the Company's functions of revenue collection. It was also not clear as to what extent could the Supreme Court exercise its jurisdiction over the servants of the Company who indulged in corruption and mal-practices. The Supreme Court and the Supreme Council often differed on these issues which widened the rift between two vital organs of govt.

(d) Further, it was not stated in the Regulating Act whether the zamindars who collected the revenue on behalf of the Company on commission basis were to be considered as the employee of the Company or not. The executive council, namely, the Governor-General and Council asserted that they being in the employment of the Company, were immune from the Supreme Court's jurisdiction whereas the Supreme Court held that they were subject to its jurisdiction.

(e) The Supreme Court of Judicature was established in Calcutta under the Charter of 1774 issued by the Crown as provided by the Regulating Act. Prior to its institution, the judicial arrangement under the Company's Judicial Plan of 1772 was in force with a regular hierarchy of courts. The highest court under the Plan was the Sadar Diwani Adalat at Calcutta. Thus, the creation of the Supreme Court resulted into two parallel, independent and rival judicial systems existing simultaneously in Calcutta.

The powers and jurisdictions of these two Courts not having been clearly specified in the Regulating Act, it led to lot of confusion and complications. Again, the competence of the Supreme Court to entertain cases of corruption and mal-practices against the Judges of the Company's Court was doubtful. The Supreme Court contended that the Judges of the Company's court were the servants of the Company and as such it could take cognizance of the charges against them but the Council did not subscribe to this view.<sup>7</sup>

(f) The Regulating Act was silent about the law to be administered by the Supreme Court of Judicature which was created on the model of Mayor's Court of 1753. Since the Mayor's Court administered English law, the Supreme Court also followed the same.

As a result of this the Indian natives had to suffer great injustice. The Supreme Court created difficulties for the Indians in matters of jurisdiction. The writ of *capias* issued by the court was a warrant of arrest and not an ordinary summons. Therefore, the person arrested under this Writ was to be kept in confinement unless the case was finally decided. The only way out was to enter into a bail which was usually fixed at a very high sum.

That apart, the Company's Mayor's Court decided the civil suits of natives only when the latter voluntarily submitted to the Court's jurisdiction. But the Supreme Court of Judicature established under the Charter of 1774 was empowered to decide the cases of natives irrespective of their consent. Further, it was also not clear whether the cases of Indian natives were to be decided according to the English law or their own personal laws.

(g) The Supreme Court followed its own procedure in the administration of criminal justice. Since under the English law, many offences were punishable with death sentence, it proved oppressive to the Indian inhabitants as the law was never formally promulgated.

### **III. THE THREE HISTORIC CASES AND THE SUPREME COURT**

There were frequent conflicts between the Supreme Court and the Supreme Council on the question of jurisdiction of the Court. Besides, the Court proved to be very expensive because the litigants were required to engage English Barrister and had to cover long distances to attend the Court.

#### ***(i) Raja Nand Kumar Case:***<sup>8</sup>

Raja Nand Kumar, a Hindu Brahmin was a big Zamindar and a very rich man of Bengal. He was loyal to the English Company ever since influential person the days of Clive and was popularly called "Black colonel" by the Company. As stated earlier, three out of the four members of the Council were opponents of Hastings, the Governor-General and thus the Council consisted of two distinct rival groups, the majority group being opposed to Hastings.

The majority group comprising Francis, Clavering and Monson instigated Nand Kumar to bring certain charges of bribery and corruption against Warren Hastings before the Council whereupon Nand Kumar in March, 1775 give a letter to Francis, one of the members of the Council complaining that in 1772, Hastings accepted from him bribery of more than rupees one lakh for appointing his son Gurudas, as Diwan.

The letter also contained an allegation against Hastings that he accepted rupees two and a half lakh from Munnī Begum as bribe for appointing her as the guardian of the minor Nawab Mubarak-ud-Daullah. Francis placed this letter before the Council in its meeting and his other

supporter, Monson moved a motion that Nand Kumar should be summoned to appear before the Council. Warren Hastings who was presiding over the meeting in the capacity of Governor-General, opposed Monson's motion on the ground that he should not sit in the meeting to hear accusations against himself nor shall he acknowledge the members of the Council to be his Judge.

Mr. Barwell, the lone supporter member of Hastings, put forth a suggestion that Nand Kumar should file his complaint in the Supreme Court because it was the Court and not the Council which was competent to hear the case. But Monson's motion was supported by the majority hence Hastings dissolved the meeting.

Thereupon, the majority of the members objected to this action of Hastings and elected Clavering to preside over the meeting in place of Hastings. Nand Kumar was called before the Council to prove his charges against Hastings. The majority members of the Council examined Nand Kumar briefly and declared that the charges levelled against Hastings were proved and directed Hastings to deposit an amount of Rs. 3,54,105 in Treasury of the Company, which he had allegedly accepted as a bribe from Nand Kumar and Munni Begum.

Hastings genuinely believed that the Council had no authority to inquire into Nand Kumar's charges against him. This event made Hastings a bitter enemy of Nand Kumar and he looked down.

Writing about this incident, Hastings for an opportunity to show him wrote to Sir Sullivan. "Nand Kumar whom I have protected and supported, whom against my nature, I have cherished like a serpent till he has stung me, is now in close connexion with my adversaries and the prime mover of all their intrigues."<sup>9</sup>

Soon after, Nand Kumar along with Fawkes and Radha Charan was charged and arrested for conspiracy at the instance of Hastings and Barwell in another case of forgery against him at the instance of one Mohan Prasad. In the conspiracy case, the Supreme Court in its decision of July 1775 fined Fawkes but reserved its judgment against Nand Kumar on the ground of pending fraud case. the forgery case was that he had forged a bond in 1770. The charge against Nand Kumar in forgery, Supreme Court proceeded with the case.

The Council protested against Nand Kumar's charge in the Finally, Nand Kumar was tried by a Jury of twelve Englishmen who returned a Court him to under an Act of the British Parliament which was passed as early as 1728. Serious efforts were made to save the life of Nand Kumar and application for granting leave to appeal to the King-in-Council the Supreme Court but the same was rejected. Another petition for recommending the case for mercy to the British

Council, was also turned down by the Supreme Court. The sentence passed by the Supreme Court was executed by hanging Nand Kumar to death on August 5, 1775. In this Hastings, succeeded in getting rid of Nand Kumar through his friend Sir Elijah Impey who was the Chief Justice of the Supreme Court at that time.

Ever since the day of Nand Kumar's trial, doubts have always been expressed about the legality and validity of Supreme Court's verdict in this case. It is often alleged that the Supreme Court in this case, acted as a willing tool to gratify the Governor-General, Hastings since, Impey, the Chief Justice, was a good friend of Hastings.<sup>10</sup>

The writers, notably, James Mill and Lord Macaulay have accused Impey of having conspired with Warren Hastings to put Nand Kumar to death. But J.F. Stephen, the staunch supporter of Nand Kumar's judgment strongly repels this contention on the ground that Nand Kumar was not tried by Impey alone but by the entire Court and the Jury also found him guilty of forgery. He asserts that "whatever connections Hastings or Impey may have had with each other, the prosecution of Nand Kumar, originated in the usual way."<sup>11</sup>

The trial of Nand Kumar disclosed that the institution of the Supreme Court hardly commanded any respect from the natives as it was characterised as "judicial murder" of Raja Nand Kumar which rudely shocked wholly unsuited to their social conditions and customs. The trial has been the conscience of mankind. According to Keith, "the sentence of Nand Kumar should have been respited by the Court as a matter of plain duty. No more odious crime has ever been committed by a British Court whether or on the provision of the English statute of 1728 making forgery a capital offence was instigation of a British Governor General."<sup>12</sup>

Keith-firmly believed that the statute was not legally in force in India because subsequent Charter of 1753 and the as Regulating Act of 1773 could not possibly be regarded introduction of English law and to apply in India as such law was a mere substantive.

All said and done, it must be stated that Impey was the first Chief Justice in India who made the people as well as the executive Government of the place to realise the existence of the judiciary. He tried his best to introduce rule of law and independence of the Court. In this endeavour he ventured to challenge the Governor-General and Council, the Zamindars and the top officials of the Company. However, as regards Nand Kumar's trial, the weight of authorities is certainly to uphold the view that it was clearly a case of miscarriage of justice if not a 'judicial murder'.<sup>13</sup>

**(ii) PATNA CASE (1777-79):**

This case<sup>14</sup> also occupies an important place in the Indian legal history because it exposed the defects of the existing system of judicial administration in the mofussils. The main issue

involved in the case included the jurisdiction of the Supreme Court over Company's judicial officers for the acts done by them in their official capacity and the legality of the constitution of Provincial Diwani Adalats. The case also brought to light the growing conflict between the Supreme Court and the Supreme Council.

A native of Kabul, Shahbaz Beg Khan came to India and served in the Company's army for some time and retired. He earned considerable wealth and settled at Patna and married one Nadirah Begum. Having no issues, he called his nephew Bahadur Beg from Kabul to live with him. He also expressed his desire to adopt Bahadur Beg as his son and make him the heir of his property and then to retire from the world. But before he could give effect to his wish, he died in December, 1776.

Shahbaz Beg left considerable property behind him which led to struggle for property between his widow and the nephew. Each one of them claimed the entire property of the deceased. Bahadur Beg (the nephew) filed a petition in the Provincial Council at Patna, claiming the property in the capacity of being the adopted son of the deceased. He also requested the Court to protect the property from being misappropriated by the widow of the deceased, namely, Nadirah Begum and depute the Mohammedan native law officers, i.e., Mufti and Kazi to ascertain his claim in the property. The widow Nadirah Begum, on the other hand, asserted her claim to the said property on the basis of three documents, namely, dower-deed (Meharnama); gift-deed (Hibanama) and acknowledgment (Ikrarnama) executed by her husband.

The Provincial Court of Patna directed the Kazi and Mufti to prepare an inventory of the property and collect and seal it until the final decision. These native law officers were also to report to the Court about the respective claims of the parties after ascertaining the facts of the case. Thus, the ex-parte proceedings initiated by the Provincial Council without any notice to the widow of the deceased was a blatant violation of principle of natural justice, which the courts never seem to bother about in those days.

The Provincial Council of Patna accepted the report of the Kazi and ordered the division of the property accordingly. However, aggrieved by the decision of the Provincial Council, Nadirah Begum preferred an appeal to the Sadar Diwani Adalat at Calcutta which comprised Governor-General and Council but the appeal remained pending for a long time without any action except an explanation being sought by Warren Hastings from Mr. Evan Law, the chief of the Patna Provincial Council.

Consequently, the widow brought an action against Bahadur Beg, Kazi and Mufti for assault, battery, false imprisonment and entering forcibly into her house and other personal injuries and

claimed damages to the tune of rupees six lakhs.

The Supreme Court issued a writ of *capias* which meant a warrant of arrest of the defendants liable to be released on furnishing bail. Consequently, the defendants, Bahadur Beg, the Kazi and Mufti were arrested and brought from Patna to Calcutta and lodged in jail having failed to furnish the bail. However, after sometime bail was offered for Kazi and Mufti and they were released on bail.

The procedure followed by the law-officers in After investigating the case they submitted their report to the Patna Council. On the basis of evidence, the Kazi reported on January 20, 1777, that widow's agent (counsel) had failed to produce the dower-deed therefore, there was nothing to disprove the assertions of Bahadur Beg that the sum of Rs. 1200/- as dower was already paid by the deceased to Nadirah Begum during his life-time. As regards the other two documents, namely, the gift-deed and acknowledgment-deed, the law-officers suggested that they were invalid being forged and, therefore, the property of the deceased should be divided into four shares, out of which three should be given to Bahadur Beg as representative of his father in India and the fourth share should go to Nadirah Begum in accordance with the Mohammedan Law of succession.

In pursuance of the Provincial Council's orders, the Kazi and Mufti has acquired the house of the deceased and collected the property and took inventory of it. During the investigation they ill-treated Nadirah Begum as a result of which, she left the house and took shelter in a "Durgah". this case was most irregular.

The case was tried by the Supreme days in November 1778 and the judgment was, 1779 the Court found that they were entrusted with the entire work of investigation. They should not have examined the witnesses themselves as this was the work of the Judge of the Provincial Council. The case revealed that in actual practice, the entire judicial work was entrusted to the native law officers probably because the English Judges of the Company were quite ignorant about the language, laws of land service which was subject to its jurisdiction.

The Kazi and Mufti pleaded in their defence that they were having the judicial capacity under the delegated authority of the Provincial Council acting in Patna. But the Court rejected their plea on the ground that Patna Council itself being a delegate of the Company could not further delegate its power as per the well-known maxim *delegatus non protest delegare*.

Therefore, the proceedings of the law-officers were "illegal and unwarranted". The Supreme Court further held that in this case the Provincial Council had not performed any judicial act itself but left it to the law-officers which was most improper. Chief Justice Impey was very

critical of the activities of the law officers who treated the widow harshly. Consequently, the Court awarded damages of rupees three lakhs against the defendants for personal injuries to the widow Nadirah Begum. <sup>15</sup>

Court directed her attorney to start prosecution against the members of Patna Provincial Council for false imprisonment caused by their order to depute a guard or sepoy to keep constant watch on the widow to force her to withdraw Bahadur Beg's case. The Council defended the case and pleaded that this act was done by the members of the Provincial Council in their official capacity.

The Supreme Court heard the case and found that the whole proceedings of the Provincial Council were illegal and corrupt and, therefore, ordered the members of the Council to pay to the widow rupees fifteen thousand as damages. The Provincial Council preferred an indictment against Nadirah Begum in the Supreme Court for forgery but it was quashed by the Court on the ground that Nadirah Begum was not the servant of the Company nor was she a resident of Calcutta.

The defendants were not able to pay the damages and hence they were ordered to be imprisoned. They were sent to Calcutta and remained behind bars until the enactment of the Settlement Act of 1781 under which they were directed to be discharged. However, old Kazi died while being taken to the passing of the Act of Settlement, 1781.

### **(iii) The Cossijurah Case (1779-80):**

During the companies rule in India, The Zamindars and farmers were required to find a surety who was held liable to pay land revenue in case of default. In the instant case Raja Sundernarayan was zamindar of Cossijurah District Midnapore in Orrisa and was under liability of land revenue to pay the company.

One Kashinath Babu, merchant of Calcutta was his surety. Being indebted to Kashinath Babu, Raja had executed upon two bonds at Calcutta in favour of Kashinath Babu. Having failed to recover the money from the Raja through the Revenue Board of Calcutta, Kashinath filed a debt suit against the Raja in the Supreme Court at Calcutta on August 13, 1779. Raja was collecting land revenue being zamindar of Company, was in the service of the Company and, therefore, he came under the services of the company and under the jurisdiction of the Supreme Court. The Supreme Court thereupon issued a writ of the *habeas corpus* for the arrest of Raja of Cossijurah.

Meantime the Collector of Midnapore reported the matter to the Governor-General and Council complaining that the revenue collection of the District was being adversely affected due to this action of the Supreme Court against the Zamindar of Cossijurah. Hastings and his Council

consulted the Attorney-General on the point whether the Supreme Court was empowered to entertain private debt suit of Company's servants.<sup>16</sup>

On advice of the Attorney General, the Supreme Council instructed the Zamindar not to obey the process of the Supreme Court and also issued a general notification to all the Zamindars in the territories of Bengal, Bihar and Orissa that they were not to submit to the process of the Supreme Court except in two cases, namely, unless they were the servants of the Company or they voluntarily accepted the jurisdiction of the Supreme Court under a control with one of the His Majesty's subjects in a case exceeding the value of five hundred rupees.

The first writ having been returned unexecuted, the Supreme Court issued another writ against the Raja of Cossijurah in order to sequester the land and effects of the Zamindar. This time sixty men along with a Sheriff of the Court were sent to execute the writ.<sup>17</sup> Encouraged by the directors of the Supreme Council, the Zamindar used force and drove away the Sheriff's officers with their men. The Supreme Council also directed the Collector of Midnapore not to any assistance to the Sheriff's men. The Zamindar alleged that Sheriff's men entered his house, injured his servants, forcibly broke open the door and entered his zanana and committed outrages upon the place of religious worship.

Thereupon, the Supreme Council directed Colonel Ahmity, the Officer Commanding the troops at Midnapore to despatch sufficient force, intercept and arrest Sheriff's men. Warren Hastings, the Governor-General declared that we are upon the eve of an open war with the Court.<sup>18</sup>

In obedience to these orders of the Supreme Council, Colonel Ahmity sent Lt. Bamford with two, companies to arrest Sheriff's men, who with the help of Assistant Collector of Midnapore arrested the Sheriff and his men, kept them in confinement for three days and then sent them to Calcutta as prisoners.<sup>19</sup> The Sheriff and his men were finally released by the Supreme Council but the Governor-General directed Colonel Ahmity to resist any further writ of the Supreme Court.

Aggrieved by the action of Supreme Council in interfering with the case, Kashinath Babu brought an action against the Governor General and the members of the Council individually, for having assaulted the Sheriff and his men and taking back from them the property seized, with a motive to deprive him (Kashinath) of the recovery of his debt from Raja of Cossijurah.

At first, the councillors appeared before the Supreme Court and pleaded that the alleged acts were done by them in their public capacity but subsequently, they decided to withdraw their appearance on the advice of Attorney-General. The Supreme Court issued writ against the members of the Council excluding Hastings and Barwell but the Army officials did not allow

the officials of the Court to serve the writ to the members.

The Supreme Court felt offended at this and put the Attorney-General of the Company, North Naylor in prison for advising the Company to refuse the Court's processes. Naylor died in prison.

The Court had no force to compel appearance of the member-Councillors. It was at this stage that Kashinath Babu withdrew his suit against Raja of Cossijurah and the Governor-General and Council in view of the serious consequences arising out of the case.<sup>20</sup>

#### **IV. ESTABLISHMENT OF SUPREME COURT OF INDIA AFTER INDEPENDENCE**

The Original Constitution of 1950 envisaged a Supreme Court with a Chief Justice and seven puisne Judges. In the early years, all the Judges of the Supreme Court sat along to listen to the case conferred before them. Because of the work of the Court and arrears of cases began to increase, Parliament increased the range of Judges from eight in 1950 to eleven in 1956, fourteen in 1960, eighteen in 1978, twenty-six in 1986 and thirty in 2019. Now they sit in smaller Benches of two and three, coming back along in larger Benches of five and additional if needed to try and do therefore or to settle a distinction of opinion or argument.

The Supreme Court of India presently contains the Chief Justice and not less than thirty-three alternative Judges appointed by the President of India.<sup>21</sup> Supreme Court Judges retire upon attaining the age of sixty-five years.<sup>22</sup> So as to be appointed as a judge of the Supreme Court, someone should be a citizen of India and should at least for five years, a judge of a High Court or of two or additional such Courts in succession, or an Advocate of a High Court or of two or additional such Courts in succession for a minimum of ten years or he should be, within the opinion of the President, a distinguished jurist.<sup>23</sup> Provisions exist for the appointment of an Acting Chief justice<sup>24</sup> and Ad-hoc judge<sup>25</sup> of the Supreme Court and for retired Judges<sup>26</sup> of the Supreme Court or High Courts to take a seat and act as Judges of that Court.

The Supreme Court shall be the court of record<sup>27</sup> and shall sit in Delhi or in such other place or places as the Chief Justice of India may with the approval of the President, from time to time, may appoint.<sup>28</sup>

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#### **V. ENDNOTES**

1. Section 13 of the Regulating Act, 1773.
2. Section 38 of the Regulating Act, 1773.

3. Pananjape, N.V., Indian Legal and Constitutional History, (ed.7<sup>th</sup>), p.62
4. Patra, A.C.: The Administration of Justice under East India Company in Bengal, Bihar and Orissa, p. 106 (1962).
5. Banerjee, A.C.: Constitutional Development Vol. I p. 59 (1948).
6. Stephen, J.F.: The story of Nand Coomar and the Impeachment of Sir Elijah Impey. Vol. II, p.129.
7. Bengal Past and Present, Vol. XVII.
8. *Supra* note 61, p.87.
9. Pandey, B.N.: The Introduction of English Law into India. p. 53. See Gleig: Hastings, Vol. I, p. 506.
10. *Supra* note 71.
11. Macaulay: Essays on Warren Hastings, Edenburg Review, 1841-42, October, pp. 45-56. Stephen, J.F.: The Story of Nand Kumar (1774-83), pp 56-57.
12. Jain, M.P.: Outlines of Indian Legal History (1966) p. 123.
13. Keith, A.B.: Constitutional History of India p. 77 (1937).
14. *Ibid*.
15. *Supra* note 61, pp.73-74.
16. Thompson and Garrat: Rise and Fulfilment of British Rule in India, p. 139. See also Gleig: Memoirs of Hastings, Vol. of 1781, p.44.
17. Writ of sequestration.
18. Gleig: Memoirs of Hastings, Vol. II, p.44.
19. See Touchet Committee Report of 1781.
20. Elijah Impey Papers, Vol 162-59; Impey to Sutton March 12, 1780 pp. 431-440. Roberts, P.E.: History of British India , p. 212.
21. The Supreme Court (Number of Judges) Act, 1956.
22. Article 124(2), Constitution of India.
23. Article 124(3), Constitution of India.
24. Article 126, Constitution of India.
25. Article 127, Constitution of India.

26. Article 128, Constitution of India.

27. Article 129, Constitution of India.

28. Article 130, Constitution of India.

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